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RUEHBU/AMEMBASSY BUENOS AIRES 3672
RUEHME/AMEMBASSY MEXICO CITY 3839
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SIPDIS

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TAGS: KIPR ECON ETRD USTR PE

SUBJECT: PERU: SPECIAL 301 REVIEW

REF: STATE 08410

¶1. (SBU) Summary. Post concurs with industry recommendations that Peru remain on USTR's Special 301 Watch List for 2009. The Government of Peru's (GOP) swift effort to implement the necessary Intellectual Property Rights (IPR) legislation to comply with the provisions of the US - Peru Trade Promotion Agreement (PTPA) signaled its willingness and commitment to combat IPR violations. Peru continues to face high levels of patent, copyright, and trademark infringements in all sectors. Reoccurring challenges include adequate funding, increasing inspections, strengthening enforcement and border controls, combating public acceptance of pirated and counterfeit goods, enacting deterrent sentences, and further reducing government use of unlicensed software. The legal framework exists, but the GOP and, in particular, the judiciary need to apply the provisions more strictly in order to improve the situation. El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI), the GOP's IPR administrative agency continues to focus on enforcement training, active public campaigns, and legislative reforms to comply with the requirements of the PTPA. Nevertheless, the same challenges continue and the situation worsens. End Summary.

GOP Efforts and...

¶2. (U) The GOP's swift effort to implement the necessary IPR legislation to comply with the provisions of the PTPA signaled its willingness and commitment to combat IP violations. However, the GOP continues to fall short on allocating sufficient resources in the area of investigations and enforcement. INDECOPI's trademark, patent and copyright offices perform with limited staff and funding. INDECOPI officials and public ministry prosecutors have ex officio powers, allowing them to conduct investigations and seizures, and file charges, without an industry complaint. However, INDECOPI continues to be restrained by a lack of personnel and financial resources to perform their mandate.

Laws and Regulations

¶3. (U) Peru's IP laws are generally adequate and TRIPS compliant. Under a Special Executive Decree and during a special Congressional session during a recess period, Peru passed IPR legislation to meet the requirements of the PTPA. The PTPA corrects shortcomings and increases some protections beyond TRIPS requirements. For example, the PTPA includes provisions that enhance trademark protections,

provide copyright protection related to the Internet, mandate government use of legal software, protect confidential pharmaceutical and agrochemical test data and trade secrets, and increase penalties for IP violations.

Overall Infringement Levels Increased in 2008

¶ 14. (U) Infringement levels for 2008 remained steady or increased from 2007 levels. According to the International Intellectual Property Alliance's (IIPA) 2008 estimates, 98% of sound recordings (same level as in 2007) and 74% of business software (up from 73% in 2007 and 71% in 2006) in Peru were pirated, representing a loss of \$110.5 million (up from \$98.5 million in 2007 and \$85.5 million in 2006). Pirated CDs and DVDs, illegal copies of books, and counterfeit clothing and toys can easily be found throughout the country at markets, on street corners, and in beach areas.

...Public Indifference

¶ 15. (U) The Peruvian public does not appear willing or motivated to change their perception regarding IPR infringement. INDECOPA continues to sponsor numerous public awareness campaigns to improve the public's perception and promote the legal purchase of original products. Despite these efforts, the public continues to purchase illegal CDs, DVDs, and books from street vendors approaching their cars at stop lights, peddlers at popular beach destinations, or the more popular markets known for supplying these items. The purchases continue openly since the public realizes there is only a remote chance they will receive a strict penalty or any prosecution for this behavior.

¶ 16. (U) INDECOPA hosted its sixth "Intellectual Property Week" in 2008 with giveaways, seminars and educational efforts, discounts, and massive destructions of seized products. Among other events, the movie industry hosted a night at the cinema with reduced ticket prices.

...Patents

¶ 17. (U) The IPR provisions in the US-PTPA, which entered into force on February 1, 2009, limit the grounds for revoking a patent, thus protecting against arbitrary revocation. They clarify that test data and trade secrets submitted to a government for the purpose of product approval will normally be protected against unfair commercial use for a period of 5 years for pharmaceuticals and 10 years for agricultural chemicals. If Peru relies on U.S. FDA approval of a given drug, and meets certain conditions for expeditious approval of that drug in Peru, the period of data protection will be concurrent with the term of protection provided in the United States. The US-PTPA requires the establishment of procedures and remedies to prevent the marketing of pharmaceutical products that infringe patents. It provides protection for newly developed plant varieties.

...Copyrights

¶ 18. (U) INDECOPA's Copyrights Office conducted 21 inspections of businesses alleged to use illegal software and music CDs in 2007. This represents a decrease from 270 inspections in 2006. No formal cases reached the courts. Fines totaled over \$840,000.

Government Software Improvements

¶ 19. (U) On February 13, 2003, the GOP passed the Government Software Legalization Decree (Decreto Supremo No. 013-2003-PCM) mandating all government agencies to use legally procured software by March 31, 2005. The GOP extended this deadline to December 31, 2006, and, regrettably, again to December 31, 2008, and now again to December 30, 2011. Under the PTPA, the GOP must ensure that all government agencies obtain legally procured software.

Law Enforcement

¶ 10. (U) In 2008, approximately 50 operations were conducted by the Fiscal Police (DIRPOFIS), SUNAT (tax authority) and INDECOPA. Authorities conducted these raids at some of the largest and most popularly known markets for pirated goods. They seized 882,966 burned discs, 1,423,900 blank media, 89 burners, 12 computers, 4 printers, and 26,304 art inlays. Despite these raids, these markets

continue to exist even during daylight hours and in the presence of enforcement officials.

Prosecutors and Judiciary: Minimal Convictions

¶11. (U) Despite the creation in November 2006, of four special courts and one special appeal court with national jurisdiction on IPR crimes, amendments to penalize recidivist offenders with stronger sanctions, and additional penalties for more crimes, the number of penal convictions and deterrent sentences in 2008 remained minimal. The average 2008 sentence was a three-year suspended sentence and the average 2008 fine was S/1000 (nuevo soles, approximately US\$300).

¶12. (U) In addition to the regular training INDECOPPI and Customs provide law enforcement officials, these entities have developed extensive training for the new judges and prosecutors. Thanks to USPTO, post has sent several judges and over twenty government officials for trainings on enforcement, patent and trademark administration in Alexandria, Virginia. Post continues to work with USPTO to coordinate IPR training in Peru.

Treaties

¶13. (U) Under the PTPA, Peru agreed to ratify or accede to the following agreements by the date of entry into force of the agreement: The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974); the Budapest Treaty on the international Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure (1977), as amended in 1980; the WIPO Copyright Treaty (1996); and the WIPO Performances and Phonograms Treaty (1996). Peru shall ratify or accede to the following agreements by January 1, 2008, or the date of entry into force of the PTPA, whichever is later: the Patent Cooperation Treaty (1970), as amended in 1979; the Trademark Law Treaty (1994); and the International Convention for the Protection of New Varieties of Plants (1991). Peru shall make all reasonable efforts to ratify or accede to the following agreements: the Patent Law Treaty (2000); the Hague Agreement Concerning the International Registration of Industrial Designs (1999); and, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989).

Comment: Recommend No Change in Status

¶14. (SBU) Post recommends that Peru remain on USTR's Special 301 Watch List. In 2008, the GOP made significant strides in implementing stricter legislation to comply with the provisions of the PTPA and to deter infringements. Despite this legislation, GOP's action continues to come up short. Over the past several years, piracy rates remained steady or increased. Action to remove pirated software from government computers continues to be delayed bringing into question the GOP's commitment to fix the problem. Lastly, the courts continue to fail in applying deterrent sentences. Commuted sentences and insignificant fines send the public a message that the judiciary views piracy as a less significant crime and supports the current public perception that purchasing pirated goods is tolerated behavior.

¶15. (SBU) Post recognizes the legislative efforts being made by the GOP to address these issues. In 2009, the GOP should focus more on enforcement procedures and applying deterrent measures to make the public and infringers aware that the GOP takes piracy seriously. Before Post can recommend a change in status, piracy rates need to reverse direction, illegal government software must be removed 100 percent, and the judiciary needs to uniformly apply deterrent sentences.

MCKINLEY